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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RICHARD L. GRIMWADE, Plaintiff and Respondent, v. ORLANDO J. ALBERTI, Defendant and Appellant.	B172577 (Los Angeles County Super. Ct. No. SC070996)

APPEAL from a judgment of the Superior Court of Los Angeles County, Valerie Baker, Judge. Affirmed.

Paul J. Cohen for Defendant and Appellant.

Richard L. Grimwade, in pro. per., for Plaintiff and Respondent.

Orlando J. Alberti appeals from the judgment entered after a jury found him liable to his former attorney Richard L. Grimwade for $146,284.94 in unpaid legal fees. Alberti contends Grimwade's recovery should have been limited to the reasonable value of the legal services provided, which in fact were of little, if any, value. Alternatively, Alberti argues the judgment should be reduced by $12,000, the amount of fees for services rendered by attorney Rick Powell, because those fees were incurred under an unauthorized fee splitting agreement. Alberti also contends a new trial is required because the trial court improperly precluded his designated expert witness from testifying. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Grimwade's Complaint*

On February 28, 2002 Grimwade filed a verified complaint, alleging Alberti owed him $146,284.94 in attorney fees for legal services rendered in connection with a lawsuit brought by Alberti against his insurer, Allstate Insurance Company (Allstate).

2. *Summary of the Evidence Presented at Trial*

Grimwade met Alberti in 1994 and learned that Alberti's home and a six-unit apartment building he owned had been destroyed in the Malibu firestorm on November 2, 1993. Alberti hired Grimwade to represent him, at $250 per hour, with respect to the recovery of insurance proceeds from Allstate for both the house and the apartment building. At Alberti's instruction, proceeds for the house were sought first. Grimwade wrote several letters to Allstate; and a settlement between Alberti and Allstate regarding the house eventually was effectuated.

Thereafter, Alberti authorized Grimwade to file a lawsuit against Allstate regarding his claim of loss on the apartment building. The lawsuit alleged Allstate had negligently calculated the policy's limits of liability for the replacement cost of the apartment building at $300,000, which was much less than the actual cost to replace the building. When the case went to trial, the court first heard the issue whether the suit was barred by the statute of limitations and ruled Alberti's suit had not been timely filed. Grimwade recommended that Alberti appeal the trial court's ruling.

Alberti informed Grimwade he wanted to appeal but no longer wished to pay $250 per hour for Grimwade's services. After protracted negotiations, in September 1997 Grimwade and Alberti agreed Alberti would pay Grimwade $125 per hour for legal services, plus a contingency fee of 20 percent of the total recovery, if any, from Allstate. Alberti also agreed to pay a retainer should the case be reversed on appeal and remanded for a trial on the merits. The agreement specified that bills were due within 30 days of their date and that Grimwade did not guarantee the outcome of the case. The agreement also provided a time schedule for Alberti to remit payment for outstanding bills for legal services previously incurred at the rate of $250 per hour; and Alberti made those payments.

Based on their new agreement, Grimwade pursued the appeal on Alberti's behalf. After oral argument in the case, but before the appellate court issued its opinion, Allstate offered $250,000 to Alberti, in addition to the $450,000 he already had been paid on his apartment building claim, to settle the case. Alberti authorized Grimwade to respond with a demand of $825,000, stating he would accept no less than $750,000 to settle the case. Allstate increased its offer, first to $300,000, then $400,000 and finally $500,000. With respect to each increase, Alberti instructed Grimwade not to respond and ultimately told Grimwade he did not want to settle with Allstate but wanted a jury trial.

Grimwade communicated to Alberti -- orally and in writing -- his strong disagreement with Alberti's decision to cease settlement negotiations with Allstate and, in particular, expressed his concern that a jury might ultimately decide that Alberti, who had vast experience with real estate valuation, did not rely on Allstate to set the limits of liability for the replacement cost of the apartment building. Alberti, nevertheless, chose not to pursue a settlement with Allstate and instructed Grimwade to withdraw the $825,000 demand. Despite Grimwade's memorialized communications, Alberti remembered these events differently, testifying he and Grimwade had agreed not to continue settlement discussions with Allstate and Grimwade had said he had a "slam dunk" case against Allstate.

After the settlement negotiations ceased, the appellate court issued its opinion, reversing the trial court's ruling that Alberti's action against Allstate was barred by the statute of limitations and remanding the case for a trial on the merits. Pursuant to the September 1997 agreement, Grimwade requested Alberti pay a $25,000 trial retainer. Alberti responded he did not have funds to pay the retainer because his money was tied up in rebuilding the apartment building. Numerous discussions regarding the trial retainer convinced Grimwade that Alberti would not pay it. On April 6, 2000 Grimwade proposed in writing that, in place of the September 1997 agreement specifying a $125 hourly rate plus a 20 percent contingency fee, he and Alberti agree to a 40 percent contingency fee without an hourly rate. Alberti never responded to the proposal; and Grimwade withdrew it on July 13, 2000. Subsequently, in late July 2000 Alberti paid Grimwade for a portion of the legal fees previously incurred at the rate of $125 per hour.

As Grimwade was preparing for a trial on the merits in Alberti's case, he determined he needed the assistance of another attorney and contacted Powell to help him conduct legal research, prepare jury instructions and find experts. According to Grimwade, Alberti agreed that Powell could assist in the preparation of his case. Grimwade arranged to pay Powell $50 per hour; he did not discuss with Powell the fee arrangement he had with Alberti. In billing Alberti for Powell's time, Grimwade discounted the hours spent by Powell by somewhat less than 50 percent (from 178 hours to 96 hours) and then included the discounted hours in his bills to Alberti. Grimwade testified that, as of the time of trial, Powell had not been paid for his services.

In the fall of 2000 Alberti's case against Allstate went to trial, the issues of duty and reliance with respect to the calculation of the $300,000 limit on replacement cost in Alberti's insurance policy being decided first. The jury returned a verdict in favor of Allstate and against Alberti on those issues. Although Grimwade regularly sent bills to Alberti, Alberti had not paid Grimwade anything since July 2000.

Alberti said he wanted to appeal the jury's verdict and Grimwade to represent him in that appeal. Grimwade reminded Alberti about the unpaid legal fees, which amounted to approximately $148,000. Because Alberti said he did not have funds available to pay,

Grimwade proposed in writing an arrangement that Alberti give him a note or secured interest for the outstanding fees and continued to offer to discuss other alternative arrangements for payment of the fees.

Despite the unpaid fees, Grimwade protected Alberti by successfully moving to reduce Allstate's requested costs from the trial and filing a notice of appeal to preserve Alberti's appellate rights. Because Grimwade and Alberti did not reach an agreement for payment of the outstanding fees, Grimwade determined he could not continue to represent Alberti and received permission from the trial court to withdraw as counsel. Alberti testified Grimwade walked away from the case. Other than authorizing Grimwade to use approximately $2,000 remaining in a trial expense fund toward the outstanding attorney fees, Alberti made no further payments to Grimwade.

3. *The Jury's Verdict and Posttrial Proceedings*

The jury returned a verdict in favor of Grimwade in the amount of $146,284.94. Judgment was thereafter entered by the court. Grimwade was awarded prejudgment interest and costs. After the trial court denied his motion for a new trial, Alberti filed a timely notice of appeal.

CONTENTIONS

Alberti contends that, because the September 1997 agreement failed to include negotiability language mandated by Business and Professions Code section 6147, Grimwade's recovery should not have been based on the hourly fee provision in the agreement but rather limited to the reasonable value of the services he provided, which were of little, if any, value. Alberti contends in the alternative the judgment should be reduced by $12,000, representing the amount billed for services performed by Powell because Grimwade did not disclose his arrangement with Powell in writing and Alberti did not consent in writing to that arrangement. Alberti also maintains his designated expert witness should have been permitted to testify despite Alberti's failure to appear at trial at the date and time ordered by the court.

DISCUSSION

1. *Alberti's Attack on the Judgment Based on Business and Professions Code Section 6147 Lacks Merit*

A contingency fee agreement between a lawyer and his or her client is required to include certain language, including "a statement that the fee is not set by law but is negotiable between attorney and client." (Bus. & Prof. Code, § 6147, subd. (a)(4).) Failure to include the mandated language "renders the agreement voidable at the option of the [client], and the attorney thereupon shall be entitled to collect a reasonable fee." (Bus. & Prof. Code, § 6147, subd. (b).)

The September 1997 agreement between Grimwade and Alberti is a hybrid agreement, providing for both an hourly and a contingency fee: Alberti agreed to pay Grimwade $125 per hour, plus a 20 percent contingency fee of any proceeds recovered. The agreement, however, did not contain the negotiability language required by Business and Professions Code section 6147, subdivision (a)(4). Although he does not specifically maintain he has exercised his option to void the agreement, Alberti contends that, because the agreement failed to contain the required negotiability language, Grimwade was not entitled to enforce the hourly fee portion of the agreement.

Alberti's contention raises a somewhat intriguing issue, that is, whether an entire hybrid agreement between a lawyer and his or her client, including the hourly fee portion, is voidable when the contingency portion of the agreement fails to contain language required by Business and Professions Code section 6147, subdivision (a). We need not reach that issue, however, because the jury's verdict is supported by substantial evidence under Alberti's own theory that Grimwade is entitled to a reasonable fee for the work performed on Alberti's behalf.

Grimwade argued to the jury that he was entitled to $125 per hour, or $146,284.94, for the legal services he had performed on Alberti's behalf. Alberti, on the other hand, argued to the jury that Grimwade should not recover under the hourly fee portion of the September 1997 agreement and was entitled only to a reasonable fee for his services, which, given his performance and the outcome of the litigation between Alberti

and Allstate, should amount to nothing. The jury was instructed on the governing principles of contract law under Grimwade's theory that he was entitled to recover based on the hourly fee portion of the September 1997 agreement. In addition, at Alberti's request the trial court instructed the jury in accordance with Alberti's theory that the September 1997 agreement was voidable and Grimwade should recover no more than a reasonable fee. Those instructions included an explanation of the factors that should be considered to determine a reasonable fee.[1] The jury returned a general verdict in favor of Grimwade for the precise amount he had requested: $146,284.94.

We presume the jury followed the trial court's instructions and properly applied them to the facts it found based on the evidence presented at trial. (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 523 ["Jurors are presumed to have understood instructions and to have correctly applied them to the facts as they find them"].) Thus, even assuming Alberti is correct that Grimwade should not be permitted to enforce the hourly fee portion of the September 1997 agreement, because the jury was properly instructed under Alberti's own theory that only a reasonable fee could be recovered, the judgment must be affirmed if substantial evidence supports the finding that

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[1] The trial court instructed the jury, "Failure by the attorney to include a statement that a fee is not set by law but is negotiable between the attorney and the client in any contingency fee agreement renders the contingency agreement voidable at the option of the client, and the attorney will be entitled to collect a reasonable fee. If it is determined that the fee is recoverable, that [*sic*] the following factors should be determined: One, the amount of the fee in proportion of the value of the services performed; two, the relative sophistication of the attorney and the client; three, the novelty and difficulty of questions involved and skill requisite to perform the legal services properly; four, the likelihood, if apparent to the client, that the acceptance of the particular agreement will include [*sic*] other employment by the attorney; [f]ive, the amount involved and the results obtained; six, the time limitations imposed by the client or by the circumstances; seven, the nature and the length of the professional relationship with the client; eight, the experience, reputation and the ability of the attorney performing the services; [n]ine, whether the fee is fixed or contingent; ten, the time and labor required; [eleven] the informed consent of the client to the fee." (See Rules Prof. Conduct, rule 4-200.) The jury was also told, "[T]he performance of the plaintiff attorney in the underlying case, Alberti v. Allstate, is relevant, and can be considered in evaluating damages, if any."

$146,284.94 was a reasonable fee for Grimwade's services. (*Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153-1154 ["'Where several counts or issues are tried, a general verdict will not be disturbed by an appellate court if a single one of such counts or issues is supported by substantial evidence and is unaffected by error, although another is also submitted to the jury without any evidence to support it and with instructions inviting a verdict upon it'"; judgment affirmed on theory of defect by failure to warn, despite allegedly improper jury instructions on theory of design defect]; see *Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 529 [where both contract and fraud legal theories are submitted to the jury, verdict will be sustained if supported by either theory].)

Substantial evidence supports the jury's award of $146,284.94 under Alberti's reasonable-fee theory.[2] Grimwade testified he had more than 30 years of experience as an attorney in complex business litigation, with a particular emphasis in professional liability and insurance. Bills detailing the legal work performed by Grimwade and the amount of time he spent on Alberti's case were introduced into evidence. Grimwade testified to the difficulty and complexity of the case based on the nature of the legal issues, the amount of damages sought and the need to work with Alberti while he was having health problems. Alberti's demand to cease settlement negotiations, despite Allstate's increasing offers, caused the case to proceed to trial. Grimwade also explained that, while he was preparing for and in trial on the case, he could not work on other

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[2] To determine whether substantial evidence supports the verdict, we review the record as a whole, resolving all conflicts in favor of the prevailing party and indulging all legitimate and reasonable inferences in favor of the verdict, to determine whether substantial evidence supports the verdict. (*Western State Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) To be "substantial," evidence need only be "of ponderable legal significance, . . . reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) If there is substantial evidence, contradicted or uncontradicted, that will support the verdict, it must be upheld regardless of whether the evidence is subject to more than one interpretation. (*Western States Petroleum Assn.*, at p. 571.) Where the record as a whole shows a reasonable trier of fact could have found in favor of respondent, we must affirm. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

matters. Moreover, because Alberti had previously paid Grimwade $250 an hour for his services, he necessarily acknowledged the reasonableness of a fee of more than $125 per hour. (See *Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 290 ["[b]ecause 'reasonable value' is such an amorphous concept, it makes no sense to ignore the best evidence of that value as expressed in the parties' agreement"]; *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 521 [contract is properly considered as evidence of the value of an attorney's services].) Based on these facts, the jury, following the trial court's instructions, could well have determined that $146,284.94 was a reasonable amount for the legal services provided to Alberti by Grimwade.

To the extent Alberti wanted a jury determination whether its award was based on the hourly rate provided in the September 1997 agreement or on a reasonable fee, it was his burden to request a special verdict. (*McCloud v. Roy Riegels Chemicals* (1971) 20 Cal.App.3d 928, 936-937 [party responsible for requesting special verdict and cannot prevail on appeal when general verdict is supported by one proper theory].) Because he did not do so, and substantial evidence supports the jury's verdict under Alberti's own theory, his contention the judgment must be reversed based on a deficiency in the September 1997 fee agreement lacks merit.

2. *The Jury's Verdict Need Not Be Reduced by $12,000 for the Fees Attributable to Work Performed by Attorney Powell*

Based on Grimwade's testimony, $12,000 of the total amount of fees he requested was attributable to work performed by attorney Powell, whom he had hired to assist him with limited aspects of Alberti's case. Alberti contends the jury's verdict should be reduced by $12,000 because he was not informed in writing and did not consent in writing to Grimwade's arrangement with Powell and, therefore, the agreement between the two constitutes unauthorized fee splitting. (See Rules Prof. Conduct, rule 2-200(A) ["A member [of the State Bar] shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless: [¶] (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and [¶] (2) The total fee

charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200"].)

Although we have considerable doubts about the validity of Alberti's challenge to Grimwade's arrangement with Powell, we need not decide whether that arrangement constituted unauthorized fee splitting. (See *Chambers v. Kay* (2002) 29 Cal.4th 142, 150-155 [evaluating whether arrangements between lawyers regarding contingency fee constituted fee splitting].)[3] At Alberti's request the jury was properly instructed it could not award fees under an unauthorized fee-splitting agreement, as provided by Rules of Professional Conduct, rule 2-200(A).[4] It is presumed the jury followed this instruction. (*Linden Partners v. Wilshire Linden Associates*, *supra*, 62 Cal.App.4th at p. 523.) Because substantial evidence supports an award of $146,284.94 based on the jury's determination of the reasonable value of Grimwade's legal services without consideration of the additional work done by Powell, no basis exists to reduce the verdict by the $12,000 Grimwade attributed to Powell's work. If Alberti had wanted a determination whether the jury was awarding fees for work performed by Powell, then it was his burden

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[3] In *Chambers v. Kay*, *supra*, 29 Cal.4th 142, the Supreme Court indicated rule 2-200 does not prohibit compensation of an outside lawyer who functions "'essentially on the same basis'" as an employee or associate of a law office when the following three criteria, identified in State Bar Formal Opinion No. 1994-138, are met: "'(1) the amount paid to the outside lawyer is compensation for work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee.'" (*Chambers*, at pp. 154-155.) The arrangement between Grimwade and Powell satisfied the second and third criteria, as well as the first part of the first criteria. It is unclear from the record in the trial court whether Grimwade agreed Powell would be paid for his work whether or not Alberti paid Grimwade.

[4] The trial court instructed the jury, "An attorney shall not be entitled to receive fees for services rendered by another attorney who's not a partner, associate or shareholder in the attorney's firm, unless the client has consented thereto in writing, and a full disclosure has been made in writing of the division of fees and the terms of such division."

to request a special verdict. (*McCloud v. Roy Riegels Chemicals*, *supra*, 20 Cal.App.3d at pp. 936-937.)

3. *No Basis for Reversal Exists Because Alberti's Designated Expert Witness Did Not Testify at Trial*

On October 20, 2003, after the trial had begun, the trial court ordered Alberti to appear on October 22, 2003 at 10:00 a.m. to testify as a witness called by Grimwade. The court advised that a failure to appear would result in sanctions, which could include the inability to call witnesses or the striking of the answer and entering of a default. The following day the trial court rescheduled the time for Alberti's appearance to 1:30 p.m.

Alberti did not appear in court at 1:30 p.m. on October 22, 2003 as ordered. At that time the trial court told Alberti's counsel that Alberti should be present by 3:30 p.m. At 3:48 p.m. Alberti still had not appeared, and his counsel represented to the court, "I can go into the details. Suffice it to say, he's not going to be here this afternoon." Counsel then offered, "I'm not going to call any more witnesses at all. I will have Mr. Alberti here first thing in the morning. If he's not here, I'll stipulate to strike the answer. It's the best I can do. I can explain the circumstances if the court would like." After the jury had been excused, Alberti's counsel did not retreat from his offer not to call any witnesses. Alberti appeared at trial and testified the following morning.

On appeal Alberti argues the trial court improperly restricted his right to present his case by preventing his expert witness from testifying without entertaining an explanation for Alberti's failure to appear when ordered. This argument completely mischaracterizes the events: Alberti's expert witness did not testify because Alberti's own counsel offered not to call any witnesses when Alberti did not appear as ordered by the court. The trial court did not preclude the expert testimony as a sanction, nor did it refuse to hear counsel's explanation for the failure to appear before counsel offered not to call any witnesses.[5] Indeed, giving Alberti yet one more chance to appear at the jury trial

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[5] When counsel later attempted to explain why Alberti had failed to appear, he stated Alberti could not obtain a ride to the court. The trial court justifiably concluded that was not a sufficient excuse.

he had requested, the trial court denied Grimwade's request for more serious sanctions. The facts in the case relied on by Alberti, *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 795, in which the appellate court reversed the dismissal of an indigent prisoner's case imposed as a sanction for his failure, through no fault of his own, to appear at a status conference, are plainly distinguishable from those here.

In any event, Alberti violated a court order by failing to appear; and, had the court actually prevented Alberti from calling any witnesses as a sanction, such act would not have constituted an abuse of discretion. (See *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1376-1379 [under Code Civ. Proc., § 128, subd. (a)(3), and its own inherent powers, court has the power to control the litigation before it]; see also Code Civ. Proc., § 128, subd. (a)(6) [court has power to "compel the attendance of persons to testify in an action or proceeding pending therein"]; Evid. Code, § 320 [trial court has discretion to "regulate the order of proof"].)

DISPOSITION

The judgment is affirmed. Grimwade is to recover his costs on appeal.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.